

The State of Spousal Support

In Michigan



Margaret J. Nichols

Karen Sendelbach

Nichols, Sacks, Slank & Sendelbach, P.C.

Assessment Exercise

*Refer to your
handout materials:
“The Lens Of Our
Own Experience”*

Purpose:

- To address the different purposes of spousal support and the theories behind each.
- To outline the law, both statutory and court created.
- To discuss the value of some objectivity and predictability in spousal support awards and the appropriate use of guidelines.
- To examine personal values and gender issues in the adjudication of spousal support.
- To look briefly at enforcement and modification and interstate issues.

Purposes of Spousal Support – *Traditional and Practical*

- Support and maintenance (on which we will spend most of our time),
- Minimizing disparity in post separation or divorce incomes (as opposed to property division which is to adjust the parties rights in property acquired during the marriage),
- Income shifting to take advantage of tax savings to create better financial options for divorcing parties or their families, and
- As a tax shifting device in a property settlement.

Support and Maintenance

- Alimony is the amount of money one spouse or former spouse pays to the other, by court order or upon written agreement, for support and maintenance.
- Historically, ALIMONY was in law the allowance for maintenance.
- A generation ago, the purpose of alimony was primarily punitive.
- With the coming of no-fault divorce, however, that rationale lost its credibility.

Support and Maintenance *(continued)*

- When divorce terminates a long term marriage, spousal support is used in its traditional sense as support and maintenance of a former spouse who is unable to support herself or himself at a standard of living comparable to that enjoyed during the marriage.

Support and Maintenance *(continued)*

Two types of post-divorce spousal support

1)Permanent periodic: Traditional support paid until death or, possibly, remarriage (modifiable)

2)Transitional or Rehabilitative Support:

Support of an economically dependent spouse through a limited period of education, training or job skill attainment following divorce.

Support and Maintenance *(continued)*

- There is no legal authority for an award of spousal support for a set maximum term of years nor for a non-modifiable amount of alimony. *Staple v Staple*, 241 Mich App 562, 616 NW2d 219 (2000)
- The award may be made for a suggested term of years, with a subsequent review of the behavior, needs, and incomes of the parties

Support and Maintenance *(continued)*

Upon review, support might be:

- Continued
- Modified
- Abated

Minimizing Income Disparity

- Allocating financial advantages and losses that have arisen as a function of the marriage
- A loss of income earning capacity arising from the spouse's disproportionate share of housekeeping or caregiving responsibilities
- Standard of living expectations

Minimizing Income Disparity

- Disparities in the financial impact of a short term marital relationship are usually a function of comparing the spouse's pre-marriage situation to that which each faces post-divorce
- Fault is one factor in the analysis, and should not be relied upon exclusively or too heavily in addressing a balancing or income disparity between spouses

Income Shifting Devices

- Substantial sums can be saved if alimony is deducted by a high tax bracket wage earner and becomes taxable to the lower income spouse or former spouse.
- Courts, as a rule, cannot order use of these devices.
- A judge who knows of these devices can make constructive suggestions for their use at pretrial motions or conferences.

Income Shifting Devices

- Payment of child support together with spousal support as unallocated family support
- Allows the tax savings to be divided between the parents and provides greater support for the children's household than would have been possible with simple child support and spousal support.
- The payer nets more income as well.
- Payment of attorney fees by awarding a sum to be paid to the spouse, who in turn is required to pay the same sum to her/his attorney.

Property Settlement Device — *Alimony in Gross*

- **True alimony in gross is not support** but a property settlement in a lump sum, paid over a defined period of time
- **In *Staple v Staple*, 241 Mich App 562 (2000), *supra***, the Michigan Court of Appeals determined that if the parties make absolutely clear that their intent is to have a lump sum property settlement treated as nonmodifiable alimony, taxable and deductible under IRC 71 and 215, terminating on the death of the recipient, the courts will enforce that agreement.

Property Settlement Device — Alimony in Gross *(continued)*

IRS rules look at the amount and duration of post-divorce payments and “recapture” the deducted savings if the transfer payments do not satisfy all of the IRC Section 71 requirements.

Property Settlement Device — Alimony in Gross *(continued)*

Two special rules that restrict the tax advantages of funding a property settlement through Section 71:

1. No substitute payment after death of payee, IRC 71(b)(1)(D)
2. Three year minimum term rule

The Law of Spousal Support

in Michigan



MCL 552.23

(1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and alimony out of the estate real and personal, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

Federal Tax Law

- The payment must be in cash;
- The governing instrument does not designate the payment as excludable from the gross income of the recipient and nondeductible by the payer
- In the case of spouses legally separated under a Judgment of Divorce or Separate Maintenance, the spouses are not members of the same household when the payments are made (*interim support before entry of a final decree does not require separate residences*);

Federal Tax Law

- The payment is not treated as child support (but see the discussion of unallocated family support. Next Handout, Section II, page 4);
- The payer has no liability to continue to make any payment after the death of the recipient or to make any payment as a substitute for such payment (to distinguish alimony from property settlements; but see Section I, page 5 regarding alimony in gross);
- Payments must not be excessively front-loaded.

Important Spousal Support Cases

- *Staple v. Staple*, 241 Mich App 562, 616 NW2d 219 (2000)
- *Sparks v. Sparks*, 440 Mich 141, 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 460 NW2d 207 (1990)
- *Parrish v Parrish*, 138 Mich App 546, 554, 361 NW2d 366 (1984) (quoting *McLain v McLain*, 108 Mich App 166, 171-172, 310 NW2d 316 (1981) enumerates the relevant factors

Relevant Factors & Lead Cases

- The past relations and conduct of the parties – *Zecchin v Zecchin*, 140 Mich App 723, 386 NW2d 652 (1986); *Sparks, supra*.
- The length of the marriage – *Johnson v Johnson*, 346 Mich 418, 78 NW2d 216 (1956); *Zecchin, supra*; *Bone v Bone*, 148 Mich 834, 385 NW2d 706 (1986) (4½ year marriage); *Ross v Ross*, 24 Mich App 19, 179 NW2d 703 (1970);
- The ability of the parties to work – *Sullivan v Sullivan*, 175 Mich App 508, 438 NW2d 309 (1989); *McLain, supra*;

Relevant Factors & Lead Cases

(continued)

- The source and amount of property awarded to the parties – *Schaffer v Schaffer*, 37 Mich App 711195 NW2d 326 (1972); *Hanaway v Hanaway*, 208 Mich App 278, 527 NW2d 792 (1995);
- The age of the parties – *Zecchin, supra*; *McLain, supra* (55 year old wife with few job skills);

Relevant Factors & Lead Cases

(continued)

- The ability of the parties to pay alimony – *Ross, supra*,
- The present situation of the parties – *Johnson, supra*;
- The needs of the parties – *Parrish, supra*;
- The health of the parties – *Kiplinger v Kiplinger*, 172 Mich App 552, 138 NW 230 (1912) (wife's broken health caused by husband's beatings was a factor in award of spousal support); *Sullivan v Sullivan*, 175 Mich App 508 (1989); *Abadi v Abadi*, 78 Mich App 73 (1977); *Demman v Demman*, 195 Mich App 109, 489 NW2d 161 (1992) (wife's cancer and future procedures a factor in award)

Relevant Factors & Lead Cases

(continued)

- The prior standard of living of the parties and whether either is responsible for the support of others – *Johnson, supra*; *Tomlinson v Tomlinson*, 338 Mich 274 (1953); *DeMay v DeMay*, 326 Mich 72 (1949); and
- General principles of equity – *Parrish, supra*; *Maake v Maake*, 200 Mich App 184, 503 NW2d 664 (1993); *Zecchin, supra*.

Theoretical Foundations for Determining Traditional Spousal Support



Three Major Theories

1. Need

- *Ability to work*
- *Source & Amount of property awarded*
- *Age of the parties*
- *Present Situation*
- *Need*
- *Health*
- *Present Standard of Living*

Three Major Theories

(continued)

2. Partnership

- Past relations and conduct
- Length of the marriage
- Prior standard of living

Three Major Theories

(continued)

3. Loss

- By the time they are in their 40's, married women make only 85% as much as unmarried women[1];
- By the time they are in their 40's, married men make more than unmarried men at every age[2];
- Only 35% of women in management positions have children[3];
- 95% of men in management positions have children.[4]

Theoretical Bases Summary

Expense Approach:

The dependent spouse will analyze what life has been like during the marriage and assign sums to the continuation of that life style. Credibility issues arise when the dependent spouse manipulates and increases expenses and the payer spouse minimizes and penny-pinches. The results are always low. One spouse supposedly receives support sufficient to meet her or his “needs” and the other retains the rest regardless of needs.

Theoretical Bases Summary

(continued)

Income Approach:

The parties' income is usually not too difficult to ascertain or deduct. The presumption is that the level of income and standard of living should be roughly equivalent after the divorce of long time marrieds, allowing perhaps for some incentive for the primary wage earner to dress, transport, and go to work.

Theoretical Bases Summary

(continued)

Income Sharing Approach:

This approach focuses on the losses occasioned by the parties' decisions about how to structure their family and economic life. If there was a marital decision (actual or by default) that the wife would be home with the children, foregoing career and job advancement, she should be repaid for the loss of earning capacity caused by that decision. See *Lee v Lee*, 191 Mich App 73 (1991) involving a 40 year marriage.

The Value of Objectivity and Predictability in Spousal Support

and the Appropriate Use of Alimony Guidelines



Objectivity & Predictability

- No prescribed formula
- Guidelines available
- Necessity for a judge to consider the equities of a situation
- Predictability allows settlement & uniform statewide results

Guideline Software Values

- It allows the clients to begin the case with a reasonable expectation
- It allows attorneys to start from the same or similar ground;
- It allows attorneys to spend their time arguing about whether the guidelines apply rather than arguing about significantly different theories of alimony (which can never be solved);
- It provides a reasonable degree of uniformity within and among the circuits;
- It provides predictability to the public.

Gender Issues in Spousal Support



Michigan Supreme Court Task Force Recommendations

- Divorce and the role of Judges and Lawyers contribute to the general disparity in domestic relations cases.[\[1\]](#)
- The resolution of economic issues is often premised on misconceptions about the economic consequences of divorce for women.[\[2\]](#)
- The manner in which alimony is determined and awarded profoundly affects the lives of the parties.[\[3\]](#)

Michigan Supreme Court

TASK FORCE: Principles Governing the Award of Alimony

Alimony should be based on the gross income of the parties and not merely on their salary income. The court should take into account dividends, pensions, deferred income, bonuses and other sources of income. Total income represents the full fruit of the couple's labor and equity demands that each should share in the totality of what they have worked together to achieve.

Michigan Supreme Court

TASK FORCE: Principles Governing the Award of Alimony *(continued)*

Alimony should be based upon the amount of money available, not merely on the basic needs of the recipient. There is no justification for limiting one spouse to essential needs while the other enjoys a significantly higher standard of living. Where both have contributed to the whole, each should equally enjoy the benefits of their contributions.

Enforcement



Enforcement

- **MCL 552.625a** provides that arrearages in spousal and child support automatically constitute liens on the payer's real and personal property.
- **Spousal support awards are enforceable through the Friend of the Court** under the Support and Parenting Time Enforcement Act (SPTEA), MCL 552.601 et. seq., MSA 25.164(1) et seq.

Other Mechanisms & Authority for Enforcement:

- **Income withholding, through SPTEA.** Private individuals can enforce an income withholding order issued by another state by sending it to a Michigan Friend of the Court.
- **Liens on real and personal property,** SPTEA, MCL 552.625, MSA 25.164(25)
- **Contempt proceedings,** MCL 552.151, MSA 25.151; *Hill v Hill*, 322 Mich 98, 33 NW2d 678 (1948). MCL 600.1701(f), MSA 27A.1701[f] provides for contempt sanctions against a delinquent payer of child or spousal support.

Other Mechanisms & Authority for Enforcement:

- **Bench warrants and bonds** - Effective April 1, 2001, MCL 552.631 and .632 were amended to require that when a bench warrant is issued, the payer must remain in custody until the time of the hearing unless a bond or cash is deposited with the court. The amendment clarifies that, although the bond or cash deposit need not be the full amount of the arrearage, it must be at least \$500 or 25% of the arrearage, whichever is greater.
- **Attachment of pension plan proceeds**

Other Mechanisms & Authority for Enforcement:

- Suspension of driver's or occupational licenses (MCL 552.628 - .630, MSA 25.164(28) – (30).
- Garnishment of lump sum profit sharing or tort claim or worker's compensation awards; *Genesee County Friend of the Court v General Motors Corp.*, 464 Mich 44, 626 NW2d 395 (2001).
- Interception of tax refunds – MCL 400.233(g).

Other Mechanisms & Authority for Enforcement:

- **Surcharges on arrearages** – 8% annual rate. MCL 552.603a, MSA 25.164(3a). The trial court does not have discretion to waive the surcharges imposed by this law. *Adams v Linderman*, 244 Mich App 178, 624 NW2d 776 (2000). The surcharge becomes part of the arrearage and may not be modified.
- **Criminal sanctions** – There is a felony nonsupport statute, MCL 750.165, MSA 28.362. It punishes a failure to pay a lawful support order coupled with a flight from the state.

Interstate Enforcement

Most actions are handled by personnel from the **Friend of the Court**. See the Uniform Interstate Family Support Act (UIFSA), MCL 552.1103(c), MSA 25.223(103)[c], eff. June 1, 1997. This act replaces the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), MCL 780.151 et seq., MSA 25.225(1) et seq., which had been in effect in Michigan since 1986.

Modification of Traditional Spousal Support



MCL 552.28, MSA 25.106

Provides for the modification of a judgment for spousal support or other allowances on the petition of either party.

MCL 552.13(2), MSA 25.93[2]

Provides for modification or termination of spousal support when a recipient remarries, unless a contrary agreement is specifically stated in the divorce judgment. However, remarriage in and of itself is not sufficient to terminate spousal support. See *Ackerman v Ackerman*, 163 Mich App 796, 414 NW2D 919 (1987). The award may be modified or abated or the expected duration shortened as a result of the remarriage.

MCL 552.607(1)(g), MSA 25.164(7)(1)[g]

Allows a delinquent payer of spousal or child support who has been notified of an impending order of income withholding to file a petition requesting modification of the future amount of support due to a change in circumstances.

MCL 552.607(1)(g), MSA 25.164(7)(1)[g]

- **A material change in circumstances is the grounds for a petition to modify spousal support.** The moving party has the burden of proof to establish the changed circumstances by a preponderance of the evidence. See *Crouse v Crouse*, 140 Mich App 234, 363 NW2d 461 (1985).
- **If the judgment of divorce contemplates future changes, these cannot become a basis for a petition to modify.** See for example *Stroud v Stroud*, 450 Mich 542, 542 NW2d 582 (1995)
- **If there is a reservation of spousal support, there is no need to allege or establish a change in circumstances.**

Suggested Resources

- *Michigan Family Law*,
Fifth Edition, ICLE, (2 vol.)
- *Principles of the Law of Family Dissolution:
Analysis and Recommendations*,
American Law Institute, (2000) [There is a
“Judges Consultative Group” within ALI.]

Award Determination Exercise

The parties were married for 26 years. They have raised two children who are both now adults. The claimant, who was the primary caretaker of the children, now works as a receptionist in a dental office (35 hrs. per wk.) and earns a gross income of \$19,000 per year. The other parent is an engineer at Ford Motor earning about \$91,000 per year. That party commutes and works a 45 hr. week. The claimant is 48 years old and has a HS degree. The claimant was out of the labor market until the divorce.

Award Determination Exercise

The claimant wanted the divorce because the other party “was just too controlling” and preferred the claimant’s role be nothing other than the exclusive caretaker of the household. The other party suspects an affair, denies the “controlling” allegation and believes, to the contrary, the claimant was a “leech”. Indeed, claimant now admits to have a dating relationship with the person suspected by the engineer.

Please respond to the following questions:

QUESTIONS:

1. Should the claimant be awarded spousal support?
Yes / No
2. If so, how much?
a) \$0-5,000 b) \$5,001-10,000 c) \$10,001 – 15,000 d) More
3. Should spousal support be permanent?
Yes / No
4. If not, for how long should spousal support continue?
a) 1 yr b) 2-5 yrs c) 6-10 yrs d) More than 10 yrs.
5. What contingency applies?
a) re-marriage b) attaining a college degree
c) social security d) other

Questions

Emergency

The Hall Of Justice in Lansing is experiencing an emergency.

We have been asked
to clear the building.

Please stand by.

Evaluation

Thank you for joining us today.

Please take a moment to click on the link below
and complete the
on-line evaluation.

Remember to click on “SUBMIT”
at the bottom of the page.

MJI appreciates your feedback.

